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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 165

FRANK BENIS, ALIAS FRANK BIENERT,
Appellant,

vs.

THE STATE OF GEORGIA,

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

W. O. Cooper, Jr.,
O. L. Long,
Counsel for Appellee.

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IN THE SUPREME COURT OF THE STATE OF GEORGIA

No. 33823

FRANK BENIS, ALIAS FRANK BIENERT,
Plaintiff in Error,

vs.

STATE OF GEORGIA,
Defendant in Error

FROM THE COURT OF APPEALS OF GEORGIA

SEPARATE JURISDICTIONAL STATEMENT OF APPELLEE AND MOTION TO DISMISS THE APPEAL ON THE GROUND THAT THE SUPREME COURT OF THE UNITED STATES IS WITHOUT JURISDICTION. THIS STATEMENT IS MADE IN COMPLIANCE WITH PARAGRAPH 3 OF RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

In compliance with Paragraph 3 of Rule 12 of the United States Supreme Court, and within fifteen days from the date of service of the petition for appeal from the judgments of the Court of Appeals of Georgia and the Supreme Court of Georgia to the United States Supreme Court, the State of Georgia, defendant in error, takes the position

that the Supreme Court of the United States has no jurisdiction of this case for the reason that no federal question is involved.

Appellant complains that the Court of Appeals of Georgia and the Supreme Court of Georgia misconstrued Sections 1025, 1068, 1069 and 1070 of Title 58 of the Code of Georgia, 1933, Annotated, which Code sections pertain to, and define, wholesale liquor dealers licensed under the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors of the State of Georgia.

The appellant, a licensed wholesale liquor dealer, was charged with illegally and unlawfully selling whiskey to a person who was not the holder of a retail liquor license and not the holder of a wholesale liquor license; these two classes of persons being the only persons to whom a legal sale of whiskey could be made by a licensed wholesaler.

The sections of the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors pertinent to the case are as follows:

> "A wholesaler's license shall authorize the holder to engage in the sale of distilled spirits at wholesale, by selling to the holder of a wholesale license or to the holder of a retail license for the purpose of resale. Said license fee shall be $1,000 annually. Said License shall be renewed annually on or before the first day of January."
>
> Section 1025, Title 58, 1933 Code of Georgia Annotated.

> "Nothing in this Chapter shall be construed as giving any person a right to sell spirituous liquors as herein defined, but the manufacture, sale, and distribution of spirituous liquors is declared to be a privilege in this State and not a right."
>
> Section 1068, Title 58, 1933 Code of Georgia Annotated.

"Whoever violates any of the provisions of this Chapter for which no specific penalty is provided, or any of the rules and regulations issued under authority of this Chapter, and in accord with the provisions of this Chapter, shall be guilty of a misdemeanor, and upon conviction, shall be punished as for a misdemeanor as provided in Section 27-2506."

Section 1069, Title 58, 1933 Code of Georgia Annotated.

"Whoever sells . . . furnishes or provides any spirituous, distilled liquors or intoxicating liquors and alcoholic beverages, such as are dealt with in this chapter, *other than in accordance with the provisions of this chapter* (Italics ours) shall be guilty of a misdemeanor and upon conviction shall be punished as for a misdemeanor, as provided in Sec. 27-2506."

Section 1070, Title 58, 1933 Code of Georgia Annotated.

Section 1023, Title 58, Code of Georgia, 1933, Annotated, provides for three types of licenses,—manufacturers, wholesalers, and retailers. They are defined respectfully by Sections 58-1024, 58-1025 and 58-1026. These three sections cover the whole field of the manufacture, distribution and sale of distilled spirits. It was the intention of the Legislature to give to each one certain privileges, each, however, to be confined to his particular field of operation. The Court will notice that each section, above referred to, begins with the same language, to-wit: "A manufacturer's license shall authorize"; "A wholesaler's license shall authorize"; "A retailer's license shall authorize". In other words, each licensee was granted a limited privilege or authority to handle distilled spirits in the manner set forth in each of the three Code sections. It is true that the Legislature did not say that the licensee shall be authorized to sell only to certain designated persons, it simply provided

that the license shall authorize sales to certain designated persons.

The sole question before the Court of Appeals of Georgia and the Supreme Court of Georgia, as raised by appellant's demurrer, was whether the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors made the sale of distilled spirits and whiskey by a duly licensed wholesale liquor distributor to a person other than the holder of a wholesale liquor license or the holder of a retail liquor license a penal offense. The appellant complains further in his demurrer that conviction under the state statute would deprive him of his liberty or property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The only question before the Court of Appeals of Georgia and the Supreme Court of Georgia was the construction of the statute of the State of Georgia pertaining to the Act to tax, legalize and control the manufacture, distribution and sale of whiskey in the State of Georgia.

We take the position that a decision of the state court resting upon the construction and not upon the validity of a statute of the state does not present a federal question.

It is elementary that the United States Supreme Court is without authority to review and revise the construction affixed to a state statute by a court of last resort of the state. The Supreme Court of the United States must accept as controlling the construction given to the statute by the highest court of the state. The only question which could be considered by the Supreme Court of the United States would be whether, so construed, the statute still is in violation of the Federal Constitution.

Vigliotti v. *Commonwealth of Penn.*, 258 U. S. 403 66 L. Ed. 686;

Sage Stores Co. v. *State of Kansas*, 323 U. S. 32, 89 L. Ed. 25;

Johnson v. *New York Life Ins. Co.*, 187 U. S. 491, 496, 47 L. Ed. 273;
Ross v. *Oregon*, 227 U. S. 150, 162, 57 L. Ed. 458;
Ireland v. *Woods*, 246 U. S. 223, 330, 62 L. Ed. 745;
Erie R. Co. v. *Hamilton*, 248 U. S. 369, 63 L. Ed. 307.

The sole concern of the United States Supreme Court, in this case, is to determine whether there has been a conviction under a statute that is repugnant to the Fourteenth Amendment of the Constitution of the United States. It cannot be said that the statute in question, as construed, is repugnant to the Constitution in any respect:

> "The meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court, on review, as though it had been specifically expressed in the statute."
>
> *Supreme Lodge, etc.* v. *Meyers*, 265 U. S. 30, 68 L. Ed. 885;
> *State of Missouri ex rel., Hurwitz* v. *North*, 271 U. S. 40, 70 L. Ed. 818;
> *Jackson* v. *State* (Tex.), 271 U. S. 661, 70 L. Ed. 1138.

> "The construction of a state statute by the highest court of the state must be accepted by the Federal Supreme Court when testing the validity of the statute under the federal constitution, on writ of error to the state court."
>
> *Quong Ham Wah Co.* v. *Industrial Acc. Com.* (Cal.), 255 U. S. 445, 65 L. Ed. 723;
> *Senn* v. *Tile Layers Protective Union, Local No. 5*, 301 U. S. 468, 81 L. Ed. 1229;
> *T. & S. F. Ry. Co.* v. *Railroad Com. of Calif.*, 283 U. S. 380, 75 L. Ed. 1128.

> "The Federal Supreme Court has no power to review a decision of a state court which puts upon the state statute a construction which removes every question of

constitutionality from it, and seems to us reasonable even if a somewhat different one could be conceived."

Tampa Water Works v. *Tampa*, 199 U. S. 241, 50 L. Ed. 170.

"The claim that a state statute • • • is void because not sufficiently determinate, definite and certain in its character, does not involve a federal question and the determination of the state court as to that is conclusive upon this court."

Osborne v. *Fla.*, 164 U. S. 560, 41 L. Ed. 586.
International Harvester Co. v. *Wisconsin Dept. of Taxation*, 322 U. S. 435, 88 L. Ed. 1373.

"The United States Supreme Court will not decide issue of constitutionality of state statute if case may justly and reasonably be decided upon construction of statute under which act is clearly constitutional."

Thompson v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510.

We respectfully submit that if the meaning affixed to the statute in question by the Court of Appeals of Georgia and the Supreme Court of Georgia be accepted, every basis for such contended violations of the rights of appellant under the Fourteenth Amendment to the Constitution of the United States disappears. Appellee, therefore, respectfully moves that this appeal be dismissed.

This 26 day of June, 1952.

W. O. Cooper, Jr.,
O. L. Long,
Attorneys for the State of Georgia, Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 165

FRANK BENIS, ALIAS FRANK BIENERT,
Appellant,

vs.

STATE OF GEORGIA

APPEAL FROM SUPREME COURT OF GEORGIA

APPELLANT'S REPLY TO MOTION TO DISMISS

In the separate jurisdictional statement of the appellees and motion to dismiss the appeal on the ground that the Supreme Court of the United States is without jurisdiction, filed in pursuance of Paragraph 3 of Rule 12 of this Court, counsel for the State, for the first time in this cause, invokes the provisions of Section 58-1070 of the 1933 Official Code of Georgia Annotated, and sets out in his separate statement this section, not as it appears in the Official Code or as it appears in Section 21 of the Act of the General Assembly of Georgia, known as the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors, appearing on page 121, Georgia Laws Ex. Ses. 1937-38, but in an expurgated form.

This section is as follows:

> "Giving away to induce trade or evade law, a misdemeanor.—Whoever sells or gives away to induce

trade or for the purpose of evading the provisions of this Chapter furnishes or provides any spirituous, distilled liquors, or intoxicating liquors and alcoholic beverages such as are dealt with in this Chapter, other than in accordance with the provisions of this Chapter and the rules and regulations promulgated under the same, shall be guilty of a misdemeanor, and upon conviction shall be punished as for a misdemeanor as provided in section 27-2506."

Recognizing that a valid accusation charging a crime under Section 58-1070 of the 1933 Official Code of Georgia Annotated would require an allegation of the intent of the defendant to sell or give away distilled liquors for the purpose of inducing trade or for the purpose of evading the provisions of the Revenue Tax Act, counsel for the State, in setting forth this section in his separate jurisdictional statement, deliberately strikes from this section the words "or gives away to induce trade or for the purpose of evading the provisions of this Chapter."

State's counsel also struck from this penal statute the following words: "and the rules and regulations promulgated under the same." The only reason appellant can assign for this latter deletion is that the Supreme Court of Georgia has decided that an accusation charging a violation of rules and regulations promulgated under this Chapter does not constitute a crime.

Glustrom v. *State,* 206 Ga. 734.

This is a cause of first impression in Georgia, and appellant's position has been from the very outset in this cause that the failure of Section 58-1025 of the Official Code of Georgia Annotated to expressly permit the sale by a licensed wholesaler of distilled spirits at wholesale to a person other than the holder of a wholesale license or a retail license, for the purpose of resale, is not a prohibition of such sale, and that failure to expressly permit is not to prohibit.

Appellant is sustained in this position by decisions of this Court.

U. S. v. *Resnick*, 299 U. S. 207, 209, 210, 81 L. Ed. 127, 129;

Herndon v. *Lowrey*, 301 U. S. 252, 81 L. Ed. 10666.

Counsel for appellee, in his brief in the Court of Appeals of Georgia in this cause, stated:

> "The accusation in the present case charges specifically a violation of Section 58-1025."

The Court of Appeals of Georgia, in its decision in this cause, attached to the separate jurisdictional statement of the appellant as Exhibit A, said:

> "However, the accusation in the Bienert case specifically charges a violation of Code Supp. Section 58-1025, in that it charges the defendant, as general manager of a liquor company holding a wholesaler's license, with a sale to one not the holder of either a wholesale or retail liquor license, these being the only two licensees under said Code section to whom a wholesaler may lawfully sell."

So it appears that appellant in this cause was not charged with or convicted of a violation of Section 58-1070 of the 1933 Official Code of Georgia Annotated.

This 25th day of July, 1952.

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